No. 77-1685

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANGELO ROCHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILLIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
DEBORAH WATSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established a single conspiracy as charged in the indictment.

2. Whether petitioner was prejudiced by the joint prosecution with his eight co-defendants.

3. Whether the prosecutor in closing argument improperly vouched for the credibility of government witnesses.

4. Whether it was proper for the district court to provide the jury with copies of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A) (Counts IV and VIII), and of conspiring to violate the narcotics laws of the United States, in violation of 21 U.S.C. 951, 952 and 960 (Count I) (Pet. App. 6a-26a).[1] He was sentenced to three concurrent 15-year terms of imprisonment, to be followed by a special parole term of 15 years. The court of appeals affirmed (Pet. App. 5a).

The evidence at trial showed the existence of a widespread narcotics organization whose members were responsible for the distribution in New York of hundreds of kilograms of Mexican "brown rock"

[1] The indictment charged petitioner and 23 other defendants in twenty-nine counts with various violations of the federal narcotics laws.

heroin during the period 1973-1975. The conspiracy, headed by one Fernando Gallardo, was formulated in order to take advantage of the scarcity of white heroin in New York during that period by procuring a supply of Mexican "brown rock" heroin through California sources. Gallardo's suppliers in California would import the heroin from Mexico and deliver it to couriers who had flown from New York to Los Angeles to collect the heroin (Tr. 223-225, 264, 323-325, 351, 370, 381-383, 1345-1346, 1350-1351, 2203-2204). These couriers would return to New York with the heroin and there deliver it to a regular group of wholesale distributors, who in turn would distribute it to other distributors, among them petitioner (Tr. 235-248, 250-253, 255-257, 271-280, 294-313, 331-346). The heroin would eventually be sold to the ultimate customer and user of the heroin.

During the early period of the conspiracy, Gallardo would himself fly to Los Angeles to purchase quantities of heroin. Once he had established a direct contact with the source of supply in California, Gallardo cut several of the original conspirators out of the venture (Tr. 2060-2062). By the Spring and Summer of 1974, Gallardo had established an organization of persons who assisted him in distributing heroin in New York City (Br. 6).

During the latter part of 1974 and 1975, Gallardo relied upon others, including his brother, his wife, and several of his brothers-in-law to "stash" heroin that was flown into New York City from California, as well as to count and "launder" the proceeds derived

from the distribution there of this heroin (Tr. 232-233, 257-258, 311-312, 315-319, 328-329, 346, 368, 393, 398-400, 415-418, 425-426; Br. 6). At times, other conspirators assumed temporary responsibility for the operation of this organization—either because Gallardo delegated this authority to them (Tr. 2080, 2117), or because Gallardo was incarcerated on state criminal charges (Tr. 409-410).

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the proof at trial revealed several independent and separate conspiracies, rather than the single conspiracy alleged in the indictment. He rests this contention on the lack of evidence at trial to show that he was aware of the entire range of activities of the Gallardo organization, or the different time periods involved, and on the "inconsistent identities" of the majority of the participants. The evidence demonstrates, however, that the jury, which was properly instructed on the multiple conspiracy issue (Tr. 3543-3544), see *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832 and *United States* v. *Bynum*, 485 F.2d 490 (C.A. 2), vacated on other grounds, 417 U.S. 903, was justified in finding that the government had proved the existence of a single, albeit massive, conspiracy. That evidence revealed a typical chain conspiracy in which all wholesalers, couriers, and distributors worked for a core group controlled by Gallardo and his assistants. Gallardo organized the trips to California to pick up quantities

of heroin ranging up to twelve and one-half kilograms at a time, and the proceeds from the sales made by the distributors, including petitioner, were paid to Gallardo or one of his assistants. The very scale of the conspiracy's operation was sufficient for the jury to infer each defendant's awareness of the entire venture, including its vertical and horizontal scope. See, *e.g.*, *United States* v. *Magnano*, 543 F.2d 431, 434 (C.A. 2), certiorari denied, 429 U.S. 1091; *United States* v. *Miley*, 513 F.2d 1191, 1206-1207 (C.A. 2), certiorari denied, 423 U.S. 842. Moreover, the proof established that the defendants on trial dealt directly with a distributor designated by Gallardo,[2] acted themselves as large-scale distributors, or flew to California to bring suitcases of heroin to New York. No defendant dealt in less than quarter-kilogram quantities of heroin. Accordingly, the case is governed by *Blumenthal* v. *United States*, 332 U.S. 539.

Petitioner's further contention (Pet. 4-6) that the changes in the conspiracy's membership and the shifting of roles within the conspiracy over a two-year period reflected the existence of four or five separate conspiracies is without foundation. It is well recognized that "[c]onspiracies are often agreements in flux * * * and a single conspiracy is not transposed into a multiple one simply by lapse of time, * * *

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[2] Petitioner on four occasions purchased heroin from co-defendant Raymond Rivera-Rodriguez in late Summer and Fall of 1974 (Tr. 243-245, 250-251, 271-272, 277-278, 332, 392-393).

change in membership * * * or a shifting emphasis in its locale of operations * * *." *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 790 (C.A. 2), certiorari denied, 430 U.S. 917. Whatever changes in personnel the conspiracy underwent, or shifting of roles within the conspiracy, it is evident that Gallardo headed a single conspiracy consisting of an established cadre of couriers and distributors, and that Gallardo's activity was central to the involvement of all. See *United States* v. *Moten*, 564 F.2d 620, 625 (C.A. 2), certiorari denied, 434 U.S. 959.

2. Petitioner contends (Pet. 7-9) that the joint prosecution of nine defendants, combined with the length of trial and the volume of evidence, denied him a fair trial. There is, however, no basis for concluding that the jury was unable to consider the evidence pointing to petitioner's guilt independently of the evidence relating to his co-defendants. See, *e.g.*, *United States* v. *Moten*, *supra*, 564 F.2d at 627.

Although the trial was comparatively long[3] and involved nine co-defendants, the issues were not so complicated that the jury was unable to differentiate among the several co-defendants. The trial involved a simple narcotics conspiracy, proof of which turned mainly on whether the jury believed government wit-

[3] Petitioner to the contrary (Pet. 7-8), the trial was not of unusual length. Although some six weeks passed from the start of jury selection until verdict, the evidence was presented in only fourteen trial days. The balance of time largely was accounted for by the four-day week trial schedule, three days of jury selection, two days of summations, and two days of deliberations by the jury.

nesses who testified to personal dealings in heroin with the defendants, including petitioner. As the Second Circuit has stated in a related context, a narcotics conspiracy "[is] not an antitrust or securities fraud case involving esoteric theories of law and complex business transactions beyond the ken of the ordinary juror. The purchase and sale of hard drugs is basically a simple operation, easily understandable * * *." *Moten, supra*, 564 F.2d at 627.

Indeed, the trial proved sufficiently straightforward that all defense counsel concurred in requesting the district judge to dispense with his proposal to marshal the evidence in his charge to the jury (Tr. 2579), thus belying the present contention that the evidence at trial unduly challenged the capacity of the jury to analyze the matter independently as to each defendant. Moreover, the district court repeatedly instructed the jury to consider each defendant individually (Tr. 3497, 3528, 3550, 3551, 3555-3556, 3559, 3594, 3595), and in concluding the charge the court asked each defendant and his attorney to stand in turn, as he called their names to the jury (Tr. 3595-3596).

That the jury heeded the trial court's admonitions was amply demonstrated during the course of its deliberations. The jury submitted eleven notes to the court posing questions concerning the evidence at trial. Of these notes, eight requested the reading of testimony specifically relating to six of the nine defendants, including petitioner (Tr. 3605-3606, 3607, 3640, 3669, 3670, 3684, 3694). Two of the remaining notes requested that only testimony directly applica-

ble to the defendants on trial be provided (Tr. 3648-3649, 3669). These notes illustrate that the jurors considered each defendant individually, properly distinguishing between the conduct of the defendants on trial and that of their co-conspirators.[4]

Finally, petitioner ignores the fact that in a separate trial, the same evidence would have been admissible to demonstrate the substantial scale of the conspiracy with which he was charged. As the Court of Appeals for the Second Circuit stated in *United States* v. *Stromberg*, 268 F.2d 256, 266, certiorari denied, 361 U.S. 863:

> [W]e must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to

[4] Petitioner seizes (Pet. 8) upon one ambiguous jury note as reflecting the general confusion of the jury and the prejudicial spillover effect of the joint trial. That note (Tr. 3622-3623) requested "[t]estimony of undercover agents who found heroin on seven of the defendants, not except Angelo, The Old Man, and from whom agents bought heroin." The court decided to respond to this concededly ambiguous request by having the testimony of all undercover agents read to the jury (Tr. 3643). That course led to subsequent notes, asking that the testimony be limited to that relating to the defendants on trial. In light of the clearly focused deliberations disclosed by the other notes, the inference petitioner seeks to draw from one ambiguous message is wholly unwarranted. Further, to the extent some of the jurors may have misrecollected the evidence at the time that note was submitted, the reading of the testimony in response to the note served to refresh their understanding of the evidence

> connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same.

Nor is this a case in which one defendant was affected by inflammatory evidence which was admissible solely against a co-defendant, or in which the proof of one or two defendants on trial overshadowed that offered against the remainder.[5]

3. Petitioner alleges (Pet. 9-12) that the government improperly vouched for the credibility of its witnesses by remarking in rebuttal summation that the jury should acquit the defendants if it thought the government had suggested to its witnesses that

[5] Petitioner's reliance (Pet. 8) on *United States* v. *Branker*, 395 F.2d 881 (C.A. 2), certiorari denied *sub nom. Lacey* v. *United States*, 393 U.S. 1029, and *United States* v. *Bertolotti*, 529 F.2d 149 (C.A. 2), to establish prejudice from the admission of proof of the conspiracy and the conduct of co-conspirators, is misplaced. In *Branker*, eight defendants were tried on an 81 count indictment, the first count charging them with conspiring fraudulently to obtain tax refunds to which the recipients were not entitled. There, however, the conspiracy count was withdrawn from the jury's consideration, with the result that much evidence that would not have been used against the defendants in a separate trial on the substantive counts was introduced at the joint trial. In *Bertolotti*, 17 defendants were tried together on an assortment of federal narcotics violations, the first count of the indictment charging the defendants and 12 other individuals with one overall conspiracy to distribute narcotics. The court found, however, that the government had merely merged in the indictment several conspiracies for the sake of convenience, and that the appellants had been prejudiced by the variance. No such circumstances exist here.

they "frame" innocent people. However, as the court of appeals found (Pet. App. 4a-5a), such statements are not reversible error when the defense, as here, has put in issue the question of the government's integrity in its handling of its witnesses.

Throughout the trial, the defense attorneys repeatedly sought to discredit as fabricated the testimony of the government witnesses, who were strenuously cross-examined about the length of time they had been prepared to testify by assistant United States attorneys (Tr. 454-457, 1496-1497, 1868-1870, 2236-2238) and other government agents (Tr. 585, 656-658, 2234-2236, 2701-2704), about "deals" they had made with the government (Tr. 670, 704), and about their probated sentences as compared to the prison terms of other conspirators (Tr. 643-644, 663). During closing arguments, the defense attorneys continually characterized the government's witnesses as "liars," "perjurers," and "con men" who had bought their way out of jail and "sold the government a bill of goods," and whose testimony had been well prepared (Tr. 3098-3100, 3111-3112, 3138-3142, 3145-3149, 3155, 3186, 3225-3226, 3271A, 3288-3289, 3294, 3304, 3307, 3341-3343, 3346-3347, 3357). They were further characterized as "pernicious characters" who were making a living testifying and who were being "fed and cared for by the government" (Tr. 3106, 3181-3182), which was trying to obtain a conviction by using perjured testimony (Tr. 3272). Finally, petitioner's attorney implied to the jury that a government agent had suggested to a witness that he implicate petitioner (Tr. 3192-3194).

Although it is improper to put the prestige of the United States Attorney's office behind the government's case, it is well settled that statements such as those made by the government here, to rebut attacks made directly against government witnesses, and directly or indirectly against the office of the United States Attorney, are not reversible error. *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832; *United States* v. *Brawer*, 482 F.2d 117 (C.A. 2), certiorari denied, 419 U.S. 1051; *United States* v. *Benter*, 457 F.2d 1174 (C.A. 2), certiorari denied, 409 U.S. 842.*

4. Petitioner finally contends (Pet. 13) that the district court improperly provided the jurors with a copy of the indictment, notwithstanding the fact that the substantive counts pertaining to defendants not on trial had been deleted. This claim is without merit.

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* Contrary to petitioner's assertions (Pet. 11-12), the statements made by defense counsel throughout the trial *did* "impugn the integrity of the prosecutor's office." In *Benter*, *supra*, 457 F.2d at 1176-1177, under factual circumstances similar to those here, the court stated:

> [T]he defense brought this line of argument on itself, [when defense counsel referred to the fact that witnesses had not been prosecuted nor would they be].
>
> * * * * *
>
> The above defense point insinuated that there was an agreement between the government and [two of the witnesses] for them to testify and, by implication, the plentiful references to the Government's witnesses being "crooks" and "poor liars" constituted a charge that there was a "frame" of the defendant. To this argument by inference the Government was entitled to reply * * *.

A decision to submit the indictment to the jury is within the sound discretion of the trial court. *United States* v. *Polizzi*, 500 F.2d 856, 876 (C.A. 9), certiorari denied, 419 U.S. 1120; *United States* v. *Murray*, 492 F.2d 178, 193 (C.A. 9), certiorari denied *sub nom. Roberts* v. *United States*, 419 U.S. 854; *United States* v. *Skolek*, 474 F.2d 582, 586 (C.A. 10); *Dallago* v. *United States*, 427 F.2d 546, 553 (C.A. D.C.); *United States* v. *Marquez*, 424 F.2d 236, 240 (C.A. 2), certiorari denied, 400 U.S. 828. Of course, the court must caution the jury that the indictment is not evidence. In this case, the court repeatedly so instructed the jury (Tr. 3502-3503, 3534), stressing that the indictment was merely a statement of the charges, and that the case was to be decided solely on the basis of the evidence presented in court.

Since this case involved numerous charges against nine defendants, the trial court determined quite reasonably that a copy of the indictment would help to insure that the jury would understand which counts were relevant to a particular defendant. This was plainly no abuse of discretion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

PHILLIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
DEBORAH WATSON,
Attorneys.

JULY 1978.

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